



[4830-01-p]

DEPARTMENT OF TREASURY

Internal Revenue Service

26 CFR Part 301

[TD 9764]

RIN 1545-BF39

Section 6708 Failure to Maintain List of Advisees With Respect to Reportable Transactions

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final regulations relating to the penalty under section 6708 of the Internal Revenue Code for failing to make available lists of advisees with respect to reportable transactions. Section 6708 imposes a penalty upon material advisors for failing to make available to the Secretary, upon written request, the list required to be maintained by section 6112 of the Internal Revenue Code within 20 business days after the date of such request. The final regulations primarily affect individuals and entities who are material advisors, as defined in section 6111 of the Internal Revenue Code.

DATES: Effective Date: These regulations are effective on **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

Applicability Date: For date of applicability see §301.6708-1(i).

FOR FURTHER INFORMATION CONTACT: Hilary March, (202) 317-5406 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

The collection of information contained in these final regulations has been reviewed and approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) under control number 1545-2245.

The collection of information in the final regulations is in §301.6708-1(c)(3)(ii). This information is required for the IRS to determine whether good cause exists to allow a person affected by these regulations an extension of the legislatively established 20-business-day period to furnish a lawfully requested list to the IRS. The collection of information is voluntary to obtain a benefit. The likely respondents are persons (individuals and entities) who qualify as material advisors, as defined in section 6111, who are unable to respond to a valid and statutorily authorized section 6112 list request within the statutory period of time provided by section 6708.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number.

Books and records relating to a collection of information must be retained as long as their contents might become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by section 6103 of the Internal Revenue Code.

Background

This document contains amendments to the Procedure and Administration Regulations (26 CFR Part 301) under section 6708 relating to the penalty for failure by a material advisor to maintain and make available a list of advisees with respect to reportable transactions. On March 8, 2013, a notice of proposed rulemaking (REG-160873-04) relating to the penalty under section 6708 was published in the **Federal Register** (78 FR 14939). A public hearing was scheduled for July 2, 2013. The IRS did not receive any requests to testify at the public hearing, and the hearing was cancelled. Two comments were received in response to the notice of proposed rulemaking. After considering the comments, the Treasury Department and the IRS are adopting the proposed regulations as amended by this Treasury decision. The revisions are discussed elsewhere in this document. Additionally, minor, non-substantive edits were made to the proposed regulations to improve clarity.

Summary of Comments and Explanation of Revisions

In response to the notice of proposed rulemaking, the IRS received and considered two comments. Those comments are available for public inspection at www.regulations.gov or upon request.

The comments covered ten areas: (1) Delivery of the list request by leaving it at the material advisor's last and usual place of abode or usual place of business; (2) the date the 20-business-day period begins in cases where the list request is mailed to the material advisor; (3) the imposition of the penalty on the day of compliance when the response is untimely; (4) extensions of time for complying with list requests; (5) reasonable cause for failure to furnish lists within the 20-business-day time period in

cases where a material advisor's employee violates the material advisor's section 6112 list maintenance procedures; (6) the ordinary business care standard; (7) reliance on an independent tax professional's advice; (8) the accumulation of penalties during the IRS agent's review of an incomplete list where the material advisor fails to establish that it acted in good faith; (9) the examples provided in proposed §301.6708-1(g) and (h); and (10) administrative review of the imposition of the penalty.

1. Comments Relating to §301.6708-1(b)

As proposed, §301.6708-1(b) of the regulations provided that the 20-business-day period within which the material advisor must make the list available shall begin on the first business day after the earliest of the date that the IRS (1) mails a list request by certified or registered mail, (2) hand delivers the written list request, or (3) leaves the written list request at the material advisor's last and usual place of abode or usual place of business.

A. Delivery of the list request by leaving it at the material advisor's last and usual place of abode or usual place of business

One commenter recommended deleting proposed §301.6708-1(b)(3), which allows the IRS to leave the written list request at the material advisor's last and usual place of abode or usual place of business, noting that this method of delivery did not appear in the interim guidance issued by the IRS in Notice 2004-80, 2004-2 C.B. 963. The commenter expressed a concern that the list request may be left with a child or another person who fails to deliver it to the material advisor or that it may be left on a door step and lost or destroyed before being discovered by the material advisor. If such an incident were to occur, the material advisor who did not receive a list request would

be in the difficult position of proving that they never received the list request to qualify for reasonable cause. The commenter also compared the list request to a notice of deficiency, which is delivered by certified or registered mail, and to collection due process notices, which may be given in person, left at the dwelling or usual business place of the person to whom the notice is addressed, or sent by registered or certified mail. The commenter stated that a list request is more similar to a notice of deficiency than a collection due process notice because it requires affirmative action.

There is an important way in which a list request under section 6112 is dissimilar to a notice of deficiency. A taxpayer who wishes to challenge the determination in a notice of deficiency must file a petition with the United States Tax Court within 90 days of the notice date (150 days if the taxpayer is located outside of the United States). This time period cannot be altered. By contrast, if the IRS leaves the written list request at the material advisor's usual place of business, but the material advisor does not receive the list request despite the exercise of ordinary business care, the material advisor may, depending on all facts and circumstances, qualify for an extension of the 20-business-day period to furnish the list and may have reasonable cause for failing to timely furnish the list for the days the material advisor was unaware a list request had been made.

The provision allowing for delivery of the list request to the material advisor's usual place of business is necessary to facilitate the delivery of a list request. For example, this provision enables the Service to leave a list request with the administrative assistant of the person required to maintain the list. Further, this

provision assists in the delivery of a list request to a material advisor who is attempting to evade delivery of the request.

Nonetheless, in light of the commenter's concerns, the final regulations narrow the scope of §301.6708-1(b). The final regulations provide that a list request may be left at the material advisor's usual place of business and remove the language regarding leaving the list request at the material advisor's place of abode. The final regulations also provide that a list request can only be left with an individual 18 years of age or older.

B. The date the 20-business-day period begins in cases where the list request is mailed to the material advisor

The commenter also objected that, when the IRS mails the list request, the time to comply is shorter than in cases where the request is hand delivered because under §301.6708-1(b)(1), the 20-business-day period is calculated from the date of mailing. The commenter also expressed a concern that the material advisor may have no way of determining when the IRS mailed the list request. The commenter suggested that the regulation require the list request to state the date of mailing and suggested that the 20-business-day period for making the list available begin the later of three days after the stated date of mailing or, if the material advisor can establish the date of delivery, the date of actual delivery.

With respect to the commenter's concern that the material advisor may not know the date the IRS mailed the list request, IRS employees requesting lists are expected to date the list request with the date it is mailed. Additionally, the list requests are sent by certified mail and the recipient can use the certified mail number to look up the date of

mailing if the envelope containing the list request is not itself postmarked with the date of mailing.

Regarding the rule proposed by the commenter, the statutory text of section 6708 itself provides for imposition of the penalty if the material advisor fails to make the list available upon written request “within 20 business days *after the date of such request.*” (Emphasis added.) Were the regulations to provide for the 20-business-day period to begin three days after the date the letter was mailed, in some circumstances, the material advisor would receive more than 20 business days in which to respond to the list request.

Where the list request is mailed to the material advisor, the IRS has historically interpreted “the date of such request” to refer to the date of mailing. See Notice 2004-80, 2004-2 CB 963. This interpretation is reasonable, particularly given the requirement that material advisors maintain the list in a readily accessible form. The 20-business-day period is sufficient to accommodate normal mailing time and to leave sufficient time after receipt, in ordinary circumstances, for a material advisor to produce a list that has been maintained in a readily accessible form. Adopting the rule suggested by the commenter would complicate the rule to accommodate the unusual circumstance in which the amount of time it took for the material advisor to receive the list request made it impossible for the list to be timely furnished. In such a circumstance, however, the material advisor may, considering all facts and circumstances, be eligible for an extension of the 20-business-day period and may, considering all facts and

circumstances, have reasonable cause for not providing the list within the 20-business-day period. Accordingly, this comment was not adopted.

2. Comment Relating to §301.6708-1(e)(1) and (2): The Imposition of the Penalty on the Day of Compliance when the Response Is Untimely

As proposed, the penalty was computed under §301.6708-1(e)(1) and (2) from the first calendar day after the period for furnishing a list in the form required by section 6112 (either the 20-business-day period following a written list request or the extension period, if extended) until, and including, the day the person's failure ends. One commenter stated that, if the list is furnished after the 20-business-day period, the day that the list is furnished should not be included in the penalty computation. The commenter further explained its interpretation that the language of section 6708(a)(1) providing that the penalty is imposed for "each day of such failure after the 20th day" means that the penalty may not be imposed on the day that the list is furnished to the IRS because on that day there was no failure to respond to the list request.

Section 6708(a)(1) provides:

If any person who is required to maintain a list under section 6112(a) fails to make such list available upon written request to the Secretary in accordance with section 6112(b) within 20 business days after the date of such request, such person shall pay a penalty of \$10,000 for each day of such failure after such 20th day.

The purpose of the section 6708 penalty is to encourage voluntary compliance with the requirement to maintain section 6112 lists and timely provide those lists to the IRS.

Penalizing the material advisor on the day of compliance does not significantly promote that purpose. Balancing the purpose of the penalty with the size of this particular penalty warrants adopting the comment in this case. Accordingly, §301.6708-1(e)(1) of

the regulations provides that the day the list was furnished to the IRS will not be included in the calculation of the penalty amount.

3. Comment Relating to §301.6708-1(c): Manner of and Extensions of Time for Making a List Available

Section 301.6708-1(c)(3) of the regulations permits the IRS, in its discretion, to grant an extension of the 20-business-day period upon a showing of good cause. Under the regulations as proposed, any request for an extension had to, among other requirements, state that to the best of the person's knowledge, all information and records relating to the list under that person's possession, custody, or control have been maintained according to procedures and policies consistent with sections 6001 and 6112.

The proposed regulations contained one example illustrating the application of the §301.6708-1(c)(3) extension provisions. See §301.6708-1(c)(4). The example concerns a large law firm that is a material advisor and has educated its attorneys about the firm's obligations related to reportable transactions. To ensure compliance, the firm has policies in place, under which one professional will notify the firm's compliance officer about any tax engagement involving a reportable transaction and then direct a subordinate to send the documents required to be maintained under section 6112 to the compliance officer. In compiling its section 6112 list after receiving a request from the IRS, the firm discovers that one of its attorneys, who is no longer with the firm, did not provide the documentation required by the firm's policies with respect to one reportable transaction. Because the firm will have to search for responsive documents in its

storage facility and contact clients for information, it will not be able to respond to the list request within 20 business days and requests a 10-day extension. In this example, the IRS grants the 10-day extension with respect to the one transaction at issue.

One commenter suggested that the IRS should also grant an extension where one of the firm's professionals failed to disclose one or more reportable transactions in contravention of established firm policy, and as a result, the firm did not know that it was a material advisor with respect to those transactions. In such a situation, the commenter suggested that the firm would need additional time to locate information. The commenter noted that the example in the proposed regulations does not cover such a situation and suggested that an additional example covering this situation be added to the regulation. To eliminate any confusion regarding the scenario posed by the commenter, an additional example addressing the commenter's concern has been added to §301.6708-1(c)(4).

The commenter also objected to the requirement that a person requesting an extension of the 20-business-day period must state that, to the best of the person's knowledge, all information and records relating to the list under the person's possession, custody, or control have been maintained in accordance with procedures and policies that are consistent with sections 6001 and 6112. To account for the scenario in which one of a firm's professionals has failed to disclose a reportable transaction in contravention of its policy, the commenter suggested that a person should be able to request an extension under §301.6708-1(c)(3)(ii) either by making the above statement or by providing "a detailed explanation of the procedures such person has in

place to comply with the requirements of section 6112, its efforts to adhere to such procedures, and the reasons why the specific information and records sought in the request were not so maintained.”

In some situations warranting an extension, including the scenario described by the commenter and the examples set forth in §301.6708-1(c)(4), the person requesting the extension will not be able to make the statement required by the proposed regulation. For instance, in example one of §301.6708-1(c)(4), the firm discovers after receiving the list request that a subordinate did not provide the documentation relating to a reportable transaction to the compliance officer, in contravention of the firm’s policy. Accordingly, at the time of the extension request, the firm is aware that the records relating to at least one transaction have not been maintained in accordance with its procedures and policies. The firm, therefore, cannot state that all records relating to the list have been maintained in accordance with its list maintenance procedures and policies, as the proposed regulation required. The final regulation is changed so that material advisors can make the statements required by §301.6708-1(c)(3)(ii) in order to request an extension even if, after receiving a list request, they discover a failure to comply with their list maintenance procedures, as long as, to the best of their knowledge as of the date of the list request, all information and records relating to the list had been maintained in accordance with procedures and policies consistent with sections 6001 and 6112.

The specific language suggested by the commenter, however, is very broad. Persons who are required to maintain a list under section 6112 are required and

expected to maintain the list in a readily accessible form. See §301.6112-1(d). To comply with section 6112, ordinary business care requires a person, upon discovering any failure relating to the list, to take immediate steps to correct the failure. The commenter's suggested language could allow an extension to be obtained by a person who became aware of a failure relating to the list prior to a request for the list, but who has not corrected it or has otherwise not exercised ordinary business care or made a good-faith effort to comply with section 6112 by maintaining the list in a readily accessible form.

Therefore, although the specific language suggested by the commenter was not adopted, §301.6708-1(c)(3)(ii) has been amended as set forth in the regulatory text of this rule to account for the circumstance identified by the commenter.

In addition, language is added to section 301.6708-1(c)(2) to clarify that making the list available through inspection includes allowing the IRS to copy the list. This is consistent with the underlying requirement to furnish the list under section 6112. See section 301.6112-1(e)(1) (providing that each component of the list must be furnished to the IRS in a format that enables the IRS to determine without undue delay or difficulty the information required to be included in the list). This clarification is also consistent with case law concluding that inspecting or examining includes copying documents. See, e.g., Westside Ford, Inc. v. United States, 206 F.2d 627, 634 (9th Cir. 1953) (holding that the right to inspect documents under 50 U.S.C. § 2155(a) includes the right to make copies); Boren v. Tucker, 239 F.2d 767, 771-72 (9th Cir. 1956) (holding that the

right to examine documents under section 7602 includes the right to make copies); McGarry v. Riley, 363 F.2d 421, 424 (1st Cir. 1966) (holding that a court order enforcing a summons under section 7602 necessarily allowed the Service to make copies, regardless of whether the order specifically allowed copying).

4. Comments Relating to §301.6708-1(g): Reasonable Cause for Failure to Furnish Lists Within the 20-Business-Day Time Period

Section 6708(a)(2) provides an exception to the penalty for any day in which the failure to furnish the list is due to reasonable cause. Section 301.6708-1(g) describes reasonable cause for purposes of the section 6708 penalty. Reasonable cause is determined on a case-by-case and day-by-day basis, taking into account all the relevant facts and circumstances. Factors considered in determining the existence of reasonable cause include, but are not limited to, good-faith efforts to comply with section 6112, exercise of ordinary business care, supervening events beyond the person's control, and reliance on an independent tax professional's advice. Section 301.6708-1(g) also provides examples illustrating the application of the reasonable cause provisions.

A. Reasonable cause where an employee of the material advisor violates the material advisor's section 6112 list maintenance procedures

One commenter stated that the IRS should find reasonable cause where an employee of the material advisor failed to disclose one or more reportable transactions in contravention of the firm's established list maintenance procedures, and as a result, the firm did not know that it was a material advisor with respect to those transactions.

The commenter suggested expanding the illustrations of reasonable cause to include this situation.

Similarly, the other commenter was concerned by a lack of clarity as to how the actions of a material advisor's employees, shareholders, partners, or agents would affect the material advisor's reasonable cause claim when the material advisor is a law firm, accounting firm, or similar entity. The commenter noted that, under §301.6111-3(b)(2)(iii)(A), these individuals are generally not treated as material advisors, and their tax statements are generally attributed to their employers, corporations, partnerships, or principals. The commenter suggested that proposed §301.6708-1(g)(3) be revised to clarify that a material advisor may still show reasonable cause even if one or more employees of the material advisor did not exercise ordinary business care and would not have reasonable cause, as long as the material advisor had appropriate procedures in place, the failure represents an isolated incident, and the material advisor acted promptly to correct the error upon learning of the employee's non-compliance. The commenter also suggested adding an example to proposed §301.6708-1(g) similar to that in proposed §301.6708-1(c)(4), which states that under the given circumstances, a material advisor should be granted an extension despite a former subordinate's failure to comply with its list maintenance policy.

Proposed §301.6708-1(g)(3) stated that ordinary business care may be established by showing that the material advisor established and adhered to list maintenance procedures reasonably designed and implemented to ensure compliance with section 6112. Proposed section 301.6708-1(g)(3) also stated that, considering all

the relevant facts and circumstances, a material advisor may still be able to demonstrate ordinary business care despite an isolated and inadvertent failure related to the list if the material advisor shows that steps were taken to correct any such failure upon discovery. Section 301.6708-1(g)(3) is intended to capture failures that may be caused by the actions of an individual employee, shareholder, partner, or agent of the material advisor when the material advisor is a law firm or other entity. Depending on the facts and circumstances of the particular case, a material advisor in the situations described by the commenters may be able to establish that it exercised ordinary business care and made good-faith efforts to comply with section 6112, and therefore had reasonable cause under the regulations as already proposed. Accordingly, the comment was not adopted to the extent that it recommended modifying proposed §301.6708-1(g)(3). To respond to the commenter's concerns, however, a new example 5 has been added to §301.6708-1(h)(3), in which a material advisor is determined to have reasonable cause despite a former employee's failure to comply with its list maintenance procedures.

B. The ordinary business care standard

As proposed, §301.6708-1(g)(3) provides, in relevant part: "The exercise of ordinary business care may constitute reasonable cause. To show ordinary business care, the person may, for example, show that it established, and adhered to, procedures reasonably designed and implemented to ensure compliance with the requirements of section 6112." One commenter stated that, absent extraordinary circumstances, establishing and adhering to reasonable compliance procedures should always result in

a finding of reasonable cause. The commenter suggested revising the wording of proposed §301.6708-1(g)(3) to provide that “[t]he exercise of ordinary business care *shall* constitute reasonable cause.”

Reasonable cause is determined on a case-by-case and day-by-day basis, taking into account all the relevant facts and circumstances. A material advisor will not be able to establish reasonable cause if the material advisor did not exercise ordinary business care. However, ordinary business care is not the only factor that must be taken into account to determine whether the failure was due to reasonable cause. The wording suggested by the commenter does not acknowledge that the determination of whether a material advisor establishes reasonable cause is based on all relevant facts and circumstances, including not only whether the material advisor exercised ordinary business care in maintaining a readily producible list but also whether the material advisor, upon receiving the list request, tried in good faith to make the list available within the 20-business-day period (or extended period). In fact, the suggested wording would elevate the exercise of ordinary business care above all other facts and circumstances that should be taken into account in determining reasonable cause. Although exercising ordinary business care is important, standing alone, it is not sufficient to demonstrate reasonable cause. Accordingly, this comment was not adopted.

C. Reliance on the advice of an independent tax professional

Proposed, §301.6708-1(g)(5) provided in relevant part that a person may rely on the advice of an independent tax professional to establish reasonable cause. One

commenter expressed concern that the IRS and courts would interpret this provision in such a way as to presume that a material advisor could not establish reasonable cause if it did not consult with an independent tax professional. The commenter objected to any such presumption on the basis that most material advisors have the necessary background and experience to evaluate their list maintenance obligations without seeking outside advice. The commenter suggested that the proposed regulations be amended to explicitly reject any such presumption.

Under proposed §301.6708-1(g)(1), the determination of whether a material advisor had reasonable cause is made on a case-by-case and day-by-day basis, taking into account all the relevant facts and circumstances, the most important of which are those that reflect the extent of the person's good-faith efforts to comply with section 6112. Reasonable cause under proposed §301.6708-1(g)(5) is not conditioned on seeking the advice of an independent tax professional. Rather, that section describes how reliance on an independent tax professional will be taken into account for purposes of determining whether a failure was due to reasonable cause. However, to alleviate the concern and clarify that a material advisor is not required to obtain advice from an independent tax professional to establish reasonable cause, the following sentence has been added to the final regulations under §301.6708-(g)(5)(i):

"Independent tax professional advice is not required to establish reasonable cause, and the failure to obtain advice from an independent tax professional does not preclude a finding of reasonable cause if, based on the totality of all of the relevant facts and circumstances, reasonable cause has been established."

The commenter also suggested supplementing §301.6708-1(g)(5)(i) with language indicating that reasonable reliance on the advice of an independent tax professional is to be evaluated based on the knowledge and good faith of the individual employee or employees primarily responsible for compliance procedures for the particular transaction at issue, rather than other employees at the firm.

Proposed, §301.6708-1(g)(5)(i) provided that, to establish reasonable cause, a material advisor's reliance on the advice of an independent tax professional must be reasonable and in good faith, in light of all the other facts and circumstances. While the knowledge and good faith of the individual employees primarily responsible for compliance procedures for the particular transaction is certainly relevant to the determination of whether the material advisor reasonably relied on the advice of an independent tax professional, the knowledge and good faith of those employees' supervisors or other individuals also may be relevant, depending on the specific facts and circumstances. Accordingly, this comment was not adopted.

D. Examples

Proposed section 301.6708-1(g)(6) contains examples illustrating the application of the reasonable cause provisions. Example 3, Example 5, and Example 6 of proposed §301.6708-1(g)(6) reference a particular technology for saving the data to a CD-ROM, and reference sending the paper documents to an off-site storage facility. The examples have been updated to remove any implication that any particular technology is specifically approved or required under the regulations, or that the regulations require storage of original records in both electronic and paper format.

These changes are not intended to change the principles illustrated in by these examples.

5. Comments Relating to §301.6708-1(h)(2) and (h)(3)

Section 301.6708-1(h)(2) contains special considerations for determining reasonable cause for the period after the material advisor has furnished a list and before the IRS has informed the material advisor of any identified failures in the list. Section 301.6708-1(h)(3) provides examples illustrating the application of this provision. Some of these examples involve situations where the material advisor has omitted information from the list.

A. Period of IRS review

Proposed section 301.6708-1(h)(2) provided that if the material advisor establishes that it acted in good faith in its efforts to fully comply with the requirements of section 6112, the material advisor will be deemed to have reasonable cause for the days between when the material advisor furnished the list to the IRS and when the IRS informs the material advisor of any identified failures in the list. If the material advisor does not establish that it acted in good faith, the IRS will not consider the time it takes to review a list as a factor in determining whether the material advisor has reasonable cause for that period. One commenter suggested that the penalty should stop accruing once the list has been furnished to the IRS and a specified reasonable review period has passed. The commenter also stated that the penalty should not start accruing again until the IRS has notified the material advisor that the list appears deficient.

Section 301.6708-1(h)(2) was included in the proposed regulations because a material advisor who has acted in good faith and has produced what it believes to be a complete and timely list has no reason to believe that the list is incomplete until the IRS informs that material advisor of any identified failure. Therefore, for a material advisor who acted in good faith, the proposed regulations provide that no penalty is imposed for the time it takes for the IRS to review the list and inform the material advisor of any identified failure, regardless of the length of time it takes the IRS to complete this process.

The rule in proposed §301.6708-1(h)(2) is more favorable to material advisors who have acted in good faith than the rule suggested by the commenter. Under the commenter's suggestion, a material advisor who furnished the list in good faith does not get the benefit of being deemed to have reasonable cause for the period of IRS review. However, if the commenter's suggestion is adopted, a material advisor who did not furnish a list in good faith would have reasonable cause for at least some of the time that the IRS is reviewing the list regardless of whether the facts and circumstances support reasonable cause. Consequently, the comment was not adopted.

Nevertheless, the Treasury Department and the IRS are sensitive to the commenter's concerns. In addition, it is in the IRS's interest to review lists furnished by material advisors in a timely manner so that information contained on the lists can be used as intended to assist the IRS in identifying taxpayers who participated in abusive and potentially abusive tax shelters. Therefore, the IRS will take reasonable steps to timely review lists and notify material advisors of identified failures in a timely manner.

B. Omissions from the list

In Example 1 of proposed §301.6708-1(h)(3), a supervisor within the material advisor organization carefully reviewed the list before furnishing it to the IRS, and in Example 3 of proposed §301.6708-1(h)(3), a supervisor within the material advisor organization did not review the list. One commenter suggested that these examples be modified or supplemented to eliminate what the commenter perceived to be an implication that review of a list by a supervisor within the material advisor organization would reasonably be expected to detect omissions from the list and to specify that a material advisor can demonstrate reasonable cause for omitting a transaction or advisee even if a supervisor's review did not identify the omissions. While agreeing that review of the list before submission to the IRS is appropriate, the commenter stated that this review should not be a factor in determining whether a material advisor had reasonable cause.

The commenter also suggested that in many cases in which a material advisor omits a transaction or advisee from a list, the omission may be due to a mistaken application of the reportable transaction rules or an inadvertent failure. The commenter observed that while three of the examples in proposed §301.6708-1(g) and (h) involve the omission of specific advisees from a list, none of these examples involves a finding that the material advisor had reasonable cause. The commenter suggested adding an example to either proposed subsection (g) or (h) in which the material advisor had reasonable cause for omitting the transaction or advisee from the list.

In looking at all of the facts and circumstances surrounding a material advisor's efforts to comply with section 6112, review of the list by a supervisor or some other person of authority or experience within the material advisor organization before submission of the list to the IRS is merely one factor to be taken into account to determine whether the material advisor has demonstrated reasonable cause. A failure to detect omissions or other failings in the list does not preclude a finding of reasonable cause. That point is already set forth in Example 1 of proposed §301.6708-1(h)(3), in which the supervisor's review of the list did not detect that the material advisor had furnished a draft copy of a tax opinion rather than the final document, but under the facts stated in the example, the material advisor was found to have reasonable cause.

However, to eliminate any confusion and to respond to the concerns expressed by the commenter, a new Example 5 has been added to §301.6708-1(h)(3), in which the supervisor's review of the list did not detect that the material advisor had omitted a transaction from the list, and under the facts stated in the example, the material advisor was found to have reasonable cause.

6. Comment Relating to Administrative Review

One commenter recommended that the regulations provide for administrative review in IRS Appeals of all issues pertaining to the applicability and amount of the penalty, including whether an extension should have been granted and whether reasonable cause exists, before paying the penalty. There are currently administrative procedures providing material advisors with an opportunity for prepayment review of the penalty by Appeals. See IRM 4.32.2.11.7.2. Under those procedures, the material

advisor has 30 days from the date of receipt of the notice and demand for payment of the section 6708 penalty to request administrative review by IRS Appeals. A material advisor does not have to pay any portion of the section 6708 penalty as a condition of requesting administrative review. Therefore, because the IRM already provides the material advisor with an opportunity for administrative review of the assessment of the penalty prior to payment, this comment was not adopted.

Special Analyses

Certain IRS regulations, including this one, are exempt from the requirements of Executive Order 12866, as supplemented and reaffirmed by Executive Order 13563. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations.

It is hereby certified that the collection of information in these regulations will not have a significant economic impact on a substantial number of small entities. This certification is based on the fact that the collection of information described under the heading "Paperwork Reduction Act" only affects persons who qualify as material advisors as defined in section 6111, who are statutorily required by section 6112 to maintain and furnish the underlying documents and information upon which the collection of information is based, and who are unable to meet the section 6708 statutorily provided period of time for furnishing these documents and information. Moreover, the collection of information is voluntary to receive a benefit and requiring those persons to report the information described above imposes only a minimal burden

in time or expense. Therefore, a Regulatory Flexibility Analysis under the Regulatory Flexibility Act (5 U.S.C. Chapter 6) is not required.

Pursuant to section 7805(f) of the Internal Revenue Code, the notice of proposed rulemaking preceding the final regulations was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business, and no comments were received.

Drafting Information

The principal author of these regulations is Hilary March of the Office of the Associate Chief Counsel (Procedure and Administration).

List of Subjects in 26 CFR Part 301

Employment taxes, Estate taxes, Excise taxes, Gift taxes, Income taxes, Penalties, Reporting and recordkeeping requirements.

Amendments to the Regulations

Accordingly, 26 CFR part 301 is amended as follows:

PART 301--PROCEDURE AND ADMINISTRATION

Paragraph 1. The authority citation for part 301 is amended by adding an entry in numerical order to read in part as follows:

Authority: 26 U.S.C. 7805 * * *

Section 301.6708-1 also issued under 26 U.S.C. 6708 * * *

Par. 2. Section 301.6708-1 is added to read as follows:

§301.6708-1 Failure to maintain lists of advisees with respect to reportable transactions.

(a) In general. Any person who is required to maintain a list under section 6112 who, upon written request for the list, fails to make the list available to the Secretary within 20 business days after the date of the request shall be subject to a penalty in the amount of \$10,000 for each subsequent calendar day on which the person fails to furnish a list containing the information and in the form required by section 6112 and its corresponding regulations. The penalty will not be imposed on any particular day or days for which the person establishes that the failure to comply on that day is due to reasonable cause.

(b) Calculation of the 20-business-day period. The 20-business-day period shall begin on the first business day after the earliest of the date that the IRS –

(1) Mails a request for the list required to be maintained under section 6112(a) by certified or registered mail to the person required to maintain the list;

(2) Hand delivers the written request to the person required to maintain the list; or

(3) Leaves the written request with an individual 18 years old or older at the usual place of business of the person required to maintain the list.

(c) Making a list available. (1) A person who is required to maintain a list required by section 6112 may make the list available by mailing or delivering it to the IRS within 20 business days after the date of the list request. Section 7502 and the regulations thereunder shall apply to this section.

(2) A person who is required to maintain a list required by section 6112 may also make the list available to the IRS by making it available for inspection and copying during normal business hours, as provided by section 6112, or by another agreed-upon

method, on an agreed-upon date that falls within the 20-business-day period following the list request.

(3) Extension--(i) In general. Upon a showing of good cause by the person prior to the expiration of the 20-business-day period following a list request, the IRS may, in its discretion, agree to extend the period within which to make all or part of the list available. For purposes of this paragraph, “good cause” is shown if the person establishes that the 20-business-day deadline cannot reasonably be met despite diligent efforts by the person to maintain the materials constituting a list and to make that list available to the IRS in the time and manner required by the Secretary under section 6112.

(ii) Requesting an extension. Any request for an extension of the 20-business-day period must be made in writing to the person at the IRS who requested the list. The person requesting an extension must briefly describe the information and documents that comprise the list as required by section 6112; explain the circumstances that would warrant additional time; propose a schedule to complete the production of the list; state that to the best of the person’s knowledge, as of the date of the list request, all information and records relating to the list under the person’s possession, custody, or control had been maintained in accordance with procedures and policies that are consistent with sections 6001 and 6112 of the Internal Revenue Code; and state that the extension request is not being made to avoid the person’s list maintenance obligations imposed by section 6112 and its corresponding regulations. The IRS may, in its discretion, grant the person’s extension request in full or in part. The IRS will

consider whether granting an extension may impair its ability to make a timely assessment against any of the participants in the transaction associated with the requested list. The IRS will not grant an extension if it determines that a significant reason for the extension request is to delay producing the list. A pending extension request by itself does not constitute reasonable cause for purposes of section 6708.

(4) Examples. The following examples illustrate paragraph (c)(3)(i) and (ii) of this section. These examples are intended to illustrate how the facts and circumstances in paragraph (c)(3)(i) and (ii) of this section may apply; in any given case, however, all of the facts and circumstances must be analyzed.

Example 1. (i) Firm A is a large law firm that is a material advisor. Firm A conducts annual sessions to educate its professionals about reportable transactions and the firm's obligations related to those reportable transactions. Firm A instructs its professionals to provide information on tax engagements that involve reportable transactions and to provide the documents required to be maintained under sections 6001 and 6112 to Firm A's compliance officer for list maintenance purposes. Firm A's policy provides that, for each engagement involving a reportable transaction, one firm professional will send an email to the firm's compliance officer about the engagement and then direct a subordinate to send the documents required to be maintained to the firm's compliance officer. Firm A has policies and procedures in place to monitor compliance with these rules and to address non-compliance.

(ii) Firm A receives a request from the IRS for a section 6112 list. In compiling its list to turn over to the IRS during the 20-business-day period following the list request, Firm A discovers that, with respect to one reportable transaction, a subordinate did not provide the documentation required by Firm A's policy. In addition, Firm A experiences difficulty locating the required documents as both the professional and the subordinate who worked on the matter are no longer employed by Firm A, requiring the firm to undertake an extensive search for the information responsive to the list request. Firm A also seeks the information from the firm's clients. Despite these efforts, Firm A reasonably determined that it will not be able to respond timely to the request. Within the 20-business-day period, Firm A notifies the IRS, in writing, of the difficulties it is experiencing and requests an additional 10 business days to locate and produce the information for this one transaction. Within the 20-business-day period, Firm A makes all other required list information available to the IRS, together with a description of the

information that is being searched for, all statements required by these regulations, and a proposed schedule to produce the missing information.

(iii) Under these circumstances, Firm A demonstrated that it could not reasonably make the portion of the list relating to the one transaction available within the 20-business-day period and thus qualified for an extension. Firm A had established policies and procedures reasonably designed and implemented to ensure and monitor compliance with the requirements of section 6112 and address non-compliance. Because the facts and circumstances indicate that Firm A made diligent efforts to maintain the materials constituting the list in a readily accessible form and as otherwise required under section 6112, the requested 10-business-day extension with respect to the portion of the list relating to the one transaction where records were not maintained in accordance with the firm's policies and procedures should be granted.

Example 2. (i) Assume the same facts set forth in example one, except that, in the process of compiling the list to comply with the list maintenance request, Firm A first becomes aware that a firm professional did not send an email to the firm's compliance officer about a transaction subject to the list maintenance request and did not direct a subordinate to send to the firm's compliance officer the information required to be maintained with respect to the transaction. Assume further that Firm A had a robust section 6112 compliance monitoring program in place and despite this, the firm did not know that the professional did not follow firm policies and procedures with respect to this transaction. The professional who worked on the matter is no longer employed by Firm A, causing Firm A difficulty in locating the required information and in ascertaining whether the professional in question failed to comply with Firm A's list maintenance policies with respect to any other reportable transactions. Firm A is searching its records to locate information responsive to the list request and to ensure that no other reportable transactions were omitted from the list. Firm A estimates that it will take an additional 20 business days after the 20th business day to retrieve the missing information and provide IRS with the additional information responsive to the list request. Within the 20-business-day period, Firm A notifies the IRS, in writing, of the difficulties it is experiencing and requests an additional 20 business days to locate and produce the information for this one transaction and for any other reportable transactions omitted from the list as a result of the inaction by the professional in question. Within the 20-business-day period, Firm A makes all other required list information available to the IRS, together with a description of the information that is being searched for, all statements required by these regulations, and a proposed schedule to produce the missing documents.

(ii) Under these facts and circumstances, Firm A demonstrated that it could not reasonably, within the 20-business-day period, make available the portion of the list relating to one or possibly more transactions omitted from the list because of the inaction of the professional in question. Firm A therefore qualifies for an extension. Firm A had established policies and procedures reasonably designed and implemented

to ensure and monitor compliance with the requirements of section 6112 and address non-compliance. Because the facts and circumstances indicate that Firm A made diligent efforts to maintain the materials constituting the list in a readily accessible form and as otherwise required under section 6112, the requested 20-business-day extension with respect to the portion of the list relating to the one known omitted transaction and to any other omitted reportable transactions resulting from the inaction of the professional in question should be granted.

(d) Failure to make list available. A failure to make the list available includes any failure to furnish the requested list to the IRS in a timely manner and in the form required under section 6112 and its corresponding regulations. Examples of failures to make a list available include instances in which a person fails to furnish any list; furnishes an incomplete list; or furnishes a list, whether or not complete, after the time required by this section.

(e) Computation of penalty--(1) In general. The penalty imposed by section 6708 accrues daily, beginning on the first calendar day after the expiration of the 20-business-day period following a written list request, and continues for each calendar day thereafter until the person's failure to furnish a list in the form required by section 6112 and its corresponding regulations ends. If the list is delivered or mailed to the IRS outside of the 20-business-day period, the penalty shall not apply on the day the list is delivered to the IRS or, if the list is mailed, the day the list is received by the IRS.

(2) Computation of penalty after grant of extension. If the IRS grants an extension of the 20-business-day period pursuant to paragraph (c)(3) of this section, the penalty imposed by section 6708 accrues daily, beginning on the first calendar day after the extension period expires, and continues for each calendar day thereafter until the person's failure to furnish a list in the form required by section 6112 and its

corresponding regulations ends. If the list is delivered or mailed to the IRS outside of the period of extension, the penalty shall not apply on the day the list is delivered to the IRS or, if the list is mailed, the day the list is received by the IRS.

(3) Designation agreements and concurrent application of penalty. If material advisors with respect to the same reportable transaction enter into a designation agreement pursuant to section 6112(b)(2) and §301.6112-1(f), separate penalties will be imposed on designated material advisors and nondesignated material advisors who are parties to the designation agreement for their respective periods of failure or noncompliance with a list request. A penalty will continue to accrue against a material advisor who is a party to a designation agreement until such time when a list complying with the requirements of section 6112 and its corresponding regulations is furnished by that material advisor or any other material advisor who is a party to the designation agreement.

(4) Example. The following example illustrates paragraph (e) of this section.

Example. The IRS hand delivers a written request for the list required to be maintained under section 6112 to Firm B, a material advisor, on Friday, March 10, 2017. Firm B must make the list available to the IRS on or before Friday, April 7, 2017, the 20th business day after the request was hand delivered. If Firm B fails to make the list available to the IRS by that day, absent reasonable cause or the IRS's grant of an extension of the response time, the \$10,000-per-day penalty begins on Saturday, April 8, 2017. The \$10,000 per day penalty will continue for each subsequent calendar day until Firm B makes the complete list available, except for those days for which Firm B demonstrates reasonable cause. If Firm B hand delivers a complete copy of the requested list to the IRS on the morning of Tuesday, April 11, 2017, absent reasonable cause or the IRS's prior grant of an extension for the response time, a penalty of \$30,000 will be imposed upon Firm B (for April 8, 9, and 10). See paragraphs (g) and (h) of this section for an explanation of reasonable cause.

(f) Definitions. For purposes of this section, the following definitions apply:

(1) Material advisor means a person described in section 6111 and §301.6111-3(b).

(2) Business day means every calendar day other than a Saturday, Sunday, or legal holiday within the meaning of section 7503.

(3) Reportable transaction means a transaction described in section 6707A(c)(1) and section 1.6011-4(b)(1).

(4) Listed transaction means a transaction described in section 6707A(c)(2) and §1.6011-4(b)(2) of this chapter.

(g) Reasonable cause – general applicability--(1) Overview. The section 6708 penalty will not be imposed for any day or days for which the person shows that the failure to make a complete list available to the IRS was due to reasonable cause. The determination of whether a person had reasonable cause is made on a case-by-case and day-by-day basis, taking into account all the relevant facts and circumstances. Facts and circumstances relevant to a material advisor's reasonable cause for failing to make available the list on a specific day include facts and circumstances arising after the request for the list. The person's showing of reasonable cause should relate to each specific day or days for which the person failed to make available the requested list. Factors establishing reasonable cause include, but are not limited to, factors identified in paragraphs (g) and (h) of this section.

(2) Good-faith factors. The most important factors to establish reasonable cause are those that reflect the extent of the person's good-faith efforts to comply with section 6112. The following factors, which are not exclusive, will be considered in

determining whether a person has made a good-faith effort to comply with the section 6112 requirements:

(i) The person's efforts to determine or assess its status as a material advisor as defined by section 6111;

(ii) The person's efforts to determine the information and documentation required to be maintained under section 6112;

(iii) The person's efforts to meet its obligations to maintain a readily producible list as required by section 6112;

(iv) The person's efforts, upon receiving the list request, to make the list available to the IRS within the 20-business-day period (or extended period) under paragraphs (a), (b), and (c)(3) of this section; and

(v) The person's efforts to ensure that the list furnished to the IRS is accurate and complete.

(3) Ordinary business care. The exercise of ordinary business care may constitute reasonable cause. To show ordinary business care, the person may, for example, show that the person established, and adhered to, procedures reasonably designed and implemented to ensure compliance with the section 6112 requirements. In all instances when ordinary business care is claimed as constituting reasonable cause, a person must show that the person took immediate steps, upon discovering any failure relating to the list, to correct the failure. A person's failure to take immediate steps to correct a failure related to the list upon discovering the failure is a factor weighing against a conclusion that the person exercised ordinary business care.

Notwithstanding the occurrence of an isolated and inadvertent failure, a person still may be able to demonstrate that the person exercised ordinary business care, considering all the relevant facts and circumstances, but only if the person had established and adhered to procedures reasonably designed and implemented to ensure compliance with the section 6112 requirements.

(4) Supervening events. A person may establish reasonable cause for one or more days for which, considering all the relevant facts and circumstances, the failure to timely furnish the list required by section 6112 was due solely to a supervening event beyond the person's control. Events beyond a person's control may include fire, flood, storm, or other casualty; illness; theft; or other similarly unexpected event that damages or impairs the person's relevant business records or system for processing and providing these records, or that affects the person's ability to maintain the section 6112 list or make it available to the IRS. Reasonable cause may be established only for the period that a person who exercised ordinary business care would need to provide the list from alternative records in existence, or make the list available, under the specific facts and circumstances.

(5) Reliance on opinion or advice--(i) In general. A person may rely on an independent tax professional's advice to establish reasonable cause. The reliance, however, must be reasonable and in good faith, in light of all the other facts and circumstances. For a person to be considered to have relied on the advice, the advice must have been received by the person before the date the list is required to be made available to the IRS. If the person received advice from an independent tax

professional, the person's reliance on that advice will be considered reasonable only if the independent tax professional reasonably believed that it is more likely than not that the person does not have an obligation imposed by section 6112. For example, this advice may conclude that the person is not a material advisor; that the transaction upon which the person provided material aid, assistance, or advice is not a reportable transaction for which a list was required to be maintained as of the date of the advice; that the information and documents to be produced constitute the required list; or that the information or documents withheld by the person are not required to be produced. The advice must also take into account and consider all relevant facts and circumstances, not rely on unreasonable legal or factual assumptions, not rely on or take into account the possibility that a list request may not be made, and not rely on unreasonable representations or statements of the person seeking the advice. Advice from a tax professional who is not independent may be considered in determining reasonable cause if, in light of and in relation to all the other facts and circumstances, taking into account such advice is reasonable. However, by itself, advice from a tax professional who is not independent is not sufficient to establish reasonable cause. Independent tax professional advice is not required to establish reasonable cause and the failure to obtain advice from an independent tax professional does not preclude a finding of reasonable cause if, based on the totality of all of the relevant facts and circumstances, reasonable cause has been established.

(ii) Independent tax professional. For purposes of this section, an independent tax professional is a person who is knowledgeable in the relevant aspects of Federal tax

law and who is not a material advisor with respect to the specific transaction that is the subject of the list request. For advice related to a listed transaction, a person who is a material advisor with respect to any transaction that is the same as or substantially similar to the type of transaction that is the subject of the list request will not be considered an independent tax professional.

(6) Examples. The following examples illustrate this paragraph (g). These examples are intended to illustrate how the facts and circumstances in paragraphs (g)(2) through (g)(5) of this section may apply; in any given case, however, all of the facts and circumstances must be analyzed.

Example 1. On August 11, 2017, the IRS sends a list request via certified mail to Firm C, a material advisor. Firm C consists of a sole practitioner, X, who is away from the office on vacation on this date. X has arranged for a colleague, Y, to review Firm C's mail, email, and telephone messages daily during his absence. X returns to the office the day after his vacation ends, on September 5, 2017, and immediately contacts the IRS to notify it of his absence. Firm C makes a complete list available to the IRS on September 19, 2017, 10 business days after he has returned from vacation. Firm C establishes that X was on vacation at the time the list request was sent to Firm C, and Firm C promptly furnished the requested list in a manner and time period reflecting ordinary business care and prudence upon X's return to the office. Under these circumstances, Firm C is considered to have made a good-faith effort to comply with the section 6112 requirements. Firm C has established reasonable cause for the entire period between the expiration of the 20-business-day period following the list request and the date the list was made available to the IRS. See paragraphs (g)(2) and (3) of this section.

Example 2. On March 3, 2017, the IRS hand delivers to Firm D, a material advisor, a list request related to a transaction believed by the IRS to have been implemented in November 2008 by a group of Firm D's clients (the advisees). Firm D's involvement in the transaction included implementing the transaction on behalf of some but not all of the advisees. Firm D timely makes the requested list available to the IRS. Upon review, the IRS determines that the information furnished by Firm D appears to be accurate, but the IRS believes that some of the information is incomplete because it does not contain information about certain individuals who were identified through other investigative means as Firm D's clients who may have engaged in the transaction. In response to a follow-up inquiry by the IRS, Firm D establishes, however, that it is not a

material advisor with respect to these taxpayers. Under these circumstances, Firm D has furnished the list as required by section 6112. Because the list was complete when furnished, Firm D need not make a showing of reasonable cause. See paragraph (g)(1) of this section.

Example 3. The IRS sends a list request by certified mail to Firm E, a material advisor. Firm E maintains the materials responsive to the list request on a portable data storage device. Under Firm E's established procedures for maintaining section 6112 lists, once the transaction is completed, paper documents are scanned and saved electronically according to Firm E's records management procedures. Under Firm E's records management procedures, after the scanning process is completed, Firm E sends the paper documents to an off-site storage facility. Three days before the 20th business day following the date of the written request, the electronic data is permanently destroyed. Firm E contacts the IRS representative listed as a contact person on the section 6112 list request to advise him that the relevant data was permanently destroyed. Firm E establishes that it exercised ordinary business care but that the data was nevertheless destroyed due to circumstances outside of its control. Under these circumstances, Firm E has reasonable cause for the period of time that Firm E cannot respond to the list request due to circumstances out of Firm E's control. The reasonable cause exception, however, will only be available to Firm E for the period of time that a person who exercises ordinary business care would need to obtain the materials that are part of the list, including in this case paper documents from the off-site storage facility, and furnish the list to the IRS. See paragraphs (g)(3) and (4) of section.

Example 4. On February 2, 2017, the IRS hand delivers a list request to Firm F, a material advisor. Firm F filed with the IRS the disclosure statement required by section 6111 for the reportable transaction that is the subject of the list request but did not maintain the section 6112 list documentation in a readily accessible format after filing the section 6111 statement. On March 3, 2017, the 20th business day (due to the Presidents' Day holiday) after the list request is delivered to Firm F, Firm F contacts the IRS to ask for additional time to comply with the list request, stating that it could not gather the list information together in 20 business days. Because Firm F is not able to show that it made diligent efforts to maintain the materials constituting the list in a readily accessible form, the IRS should not grant Firm F an extension of time. See paragraph (c)(3) of this section. Further, Firm F does not have reasonable cause because it has failed to demonstrate a good-faith effort to comply with the section 6112 requirements and ordinary business care. See paragraphs (g)(2) and (3) of this section.

Example 5. On August 11, 2017, the IRS sends a list request, via certified mail, to Firm G, a material advisor. Firm G consists of a sole practitioner, P. Firm G maintains the materials responsive to the list request electronically. Generally, under Firm G's records management procedures, once a transaction is completed, the documents related to that transaction are scanned and then saved electronically

consistent with IRS guidance on maintaining books and records in electronic form. P is aware of the list request but ignores it. On September 24, 2017, the 13th calendar day after the 20-business-day period following the list request (due to the Labor Day holiday), P suffers a temporary but debilitating illness that lasts 22 days. Following the illness, P immediately returns to work. After returning to work, P continues to ignore the list request. In this situation, the facts and circumstances indicate that Firm G does not have reasonable cause for any day in which there was a failure to make the list available to the IRS, including the 22 days due to the intervening event, because the failure was not due solely to the supervening event occurring on September 24, 2017. Firm G did not make a good-faith effort to make the list available to the IRS before or after the supervening event occurred. Firm G is liable for the \$10,000 per day penalty from the first day following the expiration of the 20-business-day period until but not including the day that Firm G furnishes the list to the IRS. See paragraphs (g)(2) and (4) of this section.

Example 6. On August 11, 2017, the IRS sends a list request, via certified mail, to Firm H, a material advisor. Firm H, consists of a sole practitioner, P. Firm H maintains the materials responsive to the list request electronically. Generally, under Firm H's records management procedures, once the transaction is completed, the documents are scanned and then saved electronically consistent with IRS guidance on maintaining books and records in electronic form. P is aware of the list request and begins compiling the documents to respond to the IRS within the 20-business-day period ending on September 11, 2017 (due to the Labor Day holiday). Before responding to the list request, P suffers a temporary but debilitating illness on September 3, 2017, that lasts through September 19, 2017. Upon returning to work on September 20, 2017, P contacts the IRS to explain that P experienced a temporary but debilitating illness from September 3, 2017, through September 19, 2017, and that P has returned to the office and intends to furnish the list to the IRS within a short period of time. Firm H furnishes the list to the IRS on September 22, 2017. In this situation, the facts and circumstances indicate that Firm H has reasonable cause for the period from September 12, 2017 until September 21, 2017, attributable to P's illness. The failure to furnish the list in a timely fashion was solely attributable to the supervening event occurring on September 3, 2017, and Firm H promptly furnished the requested list in a manner and time period reflecting ordinary business care upon P's return to the office. Firm H is considered to have made a good-faith effort to comply with the section 6112 requirements. Firm H has established reasonable cause for the entire period between the expiration of the 20-business-day period following the list request and the date Firm H furnished the list to the IRS. See paragraphs (g)(2) and (4) of this section.

Example 7. Firm I receives a list request for transactions that are the same or substantially similar to the listed transaction described in Notice 2002-21, 2002-1 CB 730. Firm I will be considered a material advisor with respect to a particular transaction for which it provided advice if the transaction is the same as or substantially similar to

the transaction described in Notice 2002-21. Firm I, however, is unsure whether the transaction is the same as or substantially similar to the transaction described in this Notice. Firm I obtains an opinion from Firm L, a law firm, on this issue. P, a partner in Firm L, provided tax advice to clients who invested in other Notice 2002-21 transactions, including how to report the purported tax benefits from the transaction on their income tax returns, and Firm L is a material advisor with respect to those transactions. Because Firm L is a material advisor with respect to the type of transaction that is the same as or substantially similar to the transaction described in Notice 2002-21, Firm L is not considered an independent tax professional under paragraph (g)(5)(ii) of this section. Therefore, Firm I cannot rely on advice provided by Firm L to establish reasonable cause under this paragraph (g). The IRS may consider Firm L's advice in determining reasonable cause in light of other facts and circumstances, but Firm L's advice, without more, is not sufficient to establish reasonable cause because P is not an independent tax professional under paragraph (g)(5)(ii) of this section.

Example 8. Firm J, a law firm, provides advice to various clients of the firm regarding the potential tax benefits of a reportable transaction under §1.6011-4(b)(5) of this chapter (involving a section 165 loss) and is a material advisor with respect to that transaction. Firm J also provides advice to Firm M, an accounting firm, regarding the same transaction. Firm M then advises various Firm M clients regarding this same transaction, and is a material advisor. The transaction is not a listed transaction. Firm N, a law firm that is not associated with Firm J and has not provided advice with respect to the same transaction to Firm M, has provided advice to its own clients regarding other transactions subject to § 1.6011-4(b)(5) of this chapter, but not the particular transaction that was the subject of Firm J's advice to Firm M. The IRS hand delivers a list request to Firm M, the subject of which is the transaction regarding which Firm J provided advice to Firm M. Before the expiration of the 20-business-day period, Firm M seeks advice from Firm J and Firm N about the propriety of withholding certain documents related to the transaction. Because Firm J provided advice with respect to the particular transaction that is the subject of the list request, Firm J is not an independent tax professional under paragraph (g)(5)(ii) of this section. Although Firm N has provided advice on a transaction that is considered a reportable transaction under §1.6011-4(b)(5) of this chapter, Firm N is considered to be an independent tax professional under paragraph (g)(5)(ii) of this section because Firm N did not provide material assistance with respect to the particular transaction that is the subject of the list request.

(h) Reasonable cause – special considerations --(1) Material advisor no longer in existence. If a material advisor has dissolved, been liquidated, or otherwise is no longer in existence, the person required by section 6112 to maintain the list (the “responsible person”) is subject to the penalty for failing to make the list available. In considering

whether a responsible person or successor in interest has reasonable cause for any failure to timely make the list available to the IRS, the IRS will consider all of the facts and circumstances, including those facts and circumstances relating to the dissolution, liquidation, and winding up of the original material advisor's business and any efforts the original material advisor made to comply with the section 6112 requirements before the dissolution or liquidation. When appropriate or applicable, due diligence, if any, performed by a responsible person or successor in interest will be considered, and due consideration will be given for acts taken by that person to minimize the potential for violating the section 6112 requirements.

(2) Review by IRS. Whether reasonable cause exists for a period of time will be determined based on all the relevant facts and circumstances, including facts and circumstances arising after the request for the list. If a material advisor establishes that, in its efforts to comply with the provisions of section 6112 and its corresponding regulations, it acted in good faith, as defined in paragraph (g)(2) of this section, the material advisor will be deemed to have reasonable cause for the periods of time the IRS takes to review a furnished list for compliance with the section 6112 requirements and to inform the material advisor of any identified failures in the list. If the material advisor does not establish that it acted in good faith the IRS will not consider the time it takes to review the list or inform the material advisor of identified failures as a factor in determining whether the material advisor has reasonable cause for that period.

(3) Examples. The following examples illustrate paragraph (h)(2) of this section.

Example 1. On February 2, 2017, the IRS hand delivers a list request to Firm O, a material advisor. On March 3, 2017, the 20th business day (due to the Presidents'

Day holiday) after the list request is delivered to Firm O, Firm O sends a list to the IRS that was contemporaneously prepared after Firm O issued advice with respect to the reportable transaction and continuously maintained in accordance with the requirements of section 6112 and the related regulations. Before sending the list, a supervisor at Firm O carefully reviewed the list to verify that it was comprehensive and accurate. The IRS completes its review on March 23, 2017, and determines that the list is not complete because Firm O furnished a draft copy of the tax opinion, rather than the final document, which Firm O had mistakenly misfiled. After Firm O is notified of the missing information, Firm O immediately furnishes a complete copy of the final version of the tax opinion. Firm O made a good-faith effort to comply with the section 6112 requirements, including its efforts to ensure that the list that was furnished to the IRS was accurate and complete. Firm O has reasonable cause for the entire period between the expiration of the 20-business-day period following the list request and the date it furnished the complete list to the IRS.

Example 2. On February 2, 2017, the IRS hand delivers a list request to Firm P, a material advisor. Firm P's involvement in the reportable transaction included implementing the transaction on behalf of some but not all of Firm P's clients. On March 3, 2017, the 20th business day (due to the Presidents' Day holiday) after the list request is delivered to Firm P, Firm P sends the list to the IRS. The IRS completes its review on March 23, 2017. The IRS believes the client list is incomplete because it does not contain information about certain individuals who were identified through other investigative means as clients of Firm P who may have engaged in the transaction. On March 27, 2017, in response to a follow-up inquiry by the IRS, Firm P establishes that it is not a material advisor with respect to these taxpayers. Therefore, the March 3, 2017 list was complete and accurate when first furnished. Under these circumstances, Firm P has timely furnished the list as required by section 6112. Because Firm P complied with the requirements of section 6112 no penalty applies, and Firm P does not need to establish reasonable cause for the period from March 4, 2017, through March 27, 2017, when the IRS was reviewing the list.

Example 3. On February 2, 2017, the IRS hand delivers a list request to Firm Q, a material advisor. On March 3, 2017, the 20th business day (due to the Presidents' Day holiday) after the list request is delivered to Firm Q, Firm Q sends the list to the IRS. Firm Q had not maintained a list contemporaneously after issuing the advice with respect to the reportable transaction, and created the list during the 20 business days before providing the list to the IRS. To meet the 20-business-day deadline, a supervisor did not review the final list before sending it to the IRS. The IRS completes its review on March 23, 2017, and determines that the list is not complete because it does not include 15 persons for whom Firm Q acted as a material advisor with respect to the reportable transaction. Firm Q furnishes the additional information on March 27, 2017. Because Firm Q is not able to show that it made diligent efforts to maintain the materials constituting the list in a readily accessible form and that it made a reasonable effort to ensure that the list that was furnished to the IRS was accurate and complete, Firm Q

cannot establish that it exhibited a good-faith effort to comply with the section 6112 requirements. Firm Q does not have reasonable cause for its failure to furnish the complete list from March 4, 2017, through March 26, 2017.

Example 4. Within the 20-business-day period following a list request, Firm R sends four boxes of documents comprising the required list to the IRS using a commercial delivery service. The IRS receives only three of the boxes because box 4 was erroneously self-addressed using Firm R's office address. Box 4 arrives at Firm R's office on January 6, 2017, the 2nd calendar day after the 20th business day after the list request was made. Firm R immediately recognizes its clerical error, promptly contacts the IRS, and resends the original and unopened box 4, properly addressed, to the IRS together with documentation supporting the error. The IRS receives box 4 on January 9, 2017. Under these circumstances, Firm R has reasonable cause for the late delivery of box 4 because it made a good-faith attempt to timely comply with the list request and immediately corrected an inadvertent error upon its discovery. As a result, no penalty will be imposed based on the delay in providing box 4. If, after inspection, the IRS determines that, even with the contents of box 4, the list is incomplete or defective, Firm R must establish reasonable cause for the incomplete nature of the list or the defect to avoid imposition of a penalty for the period beginning January 5, 2017, until but not including the day that Firm R furnishes the list to the IRS.

Example 5. (i) Firm S is a large law firm that is a material advisor. Firm S conducts annual sessions to educate its professionals about reportable transactions and the firm's obligations related to those reportable transactions. Firm S instructs its professionals to provide information on tax engagements that involve reportable transactions and to provide the documents required to be maintained under section 6112 to Firm S's compliance officer for list maintenance purposes. Firm S's policy provides that, for each engagement involving a reportable transaction, one firm professional will send an email to the firm's compliance officer about the engagement and then direct a subordinate to send to the firm's compliance officer the documents required to be maintained.

(ii) Firm S receives a request from the IRS for a section 6112 list. In compiling its list to turn over to the IRS during the 20-business-day period, Firm S asks all professionals to ensure that they have reported all engagements involving a reportable transaction to the firm's compliance officer. Before submission to the IRS, a Firm S supervisor reviews the list to ensure completeness. Firm S has no reason to know of any deficiencies, and in compiling its list, Firm S discovers no deficiencies.

(iii) Upon review of the list, the IRS determines that the information furnished by Firm S appears to be accurate, but the IRS believes that some of the information is incomplete because it does not contain information about an individual who may have engaged in the transaction and who was identified through other investigative means as Firm S's client. In response to a follow-up inquiry by the IRS, Firm S immediately

reviews its files and discovers that a former Firm S professional, who is no longer employed by Firm S, provided material advice to the individual with respect to carrying out a reportable transaction, but did not send an email to the firm's compliance officer about the transaction or direct a subordinate to send the documents required to be maintained to the firm's compliance officer. Firm S immediately furnishes the missing information and documents related to the identified omission to the IRS.

(iv) Firm S establishes that the professional in question ordinarily complied with Firm S's list maintenance procedures and that Firm S had no reason to know of this one omission or to suspect that the professional had failed to report any reportable transactions to the firm's compliance officer in accordance with the firm's policies. Firm S also immediately undertakes a thorough search of its electronic and paper files to locate any additional reportable transactions relating to the professional in question that may have been omitted from the list. Under these circumstances, Firm S has demonstrated that it has acted in good faith in its efforts to comply with section 6112 and is deemed to have reasonable cause for the period of time the IRS took to review the furnished list and to inform the material advisor of the identified failure in the list. See paragraph (h)(2) of this section. The reasonable cause exception, however, will only be available to Firm S with respect to the omission identified by the IRS for the period of time that a person who exercises ordinary business care would need to obtain the information and documents related to the identified omission. See paragraph (g)(3) of this section. With respect to any other omissions related to the same professional and not identified by the IRS, the reasonable cause exception will only be available to Firm S for the period of time that a person who exercises ordinary business care would need to ascertain whether any other reportable transactions were omitted from the list and to obtain the information and documents related to any such omissions. See paragraph (g)(3) of this section.

(i) Effective/applicability date. This section applies to all requests for lists required to be maintained under section 6112, including lists that persons were required to maintain under section 6112(a) as in effect before October 22, 2004, made on or after **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

John Dalrymple

Deputy Commissioner for Services and Enforcement.

Approved: March 22, 2016.

Mark J. Mazur

Assistant Secretary of the Treasury (Tax Policy).

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